

December 28, 2010



Chairman Julius Genachowski
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Atwell Baker
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Comcast/NBCU Applications
Docket 10-56

Dear Mr. Chairman and Commissioners:

This letter is submitted on behalf of Media Access Project, Free Press, Consumer Federation of America, Public Knowledge and Consumers Union ("Public Interest Groups").

In his March 11, 2010 testimony to the Senate Commerce Committee with respect to the pending Comcast/NBCU transaction, the Chairman acknowledged the Commission's obligation to conduct a "record-based agency review, with a full opportunity for interested persons to file their facts and arguments, and [to issue] a decision supported by the evidence." He said that the Commission's "decisions on mergers are made only after we compile and review a full record."

In this letter, the Public Interest Groups call upon the Commission to fulfill these commitments. In particular, they note the failure of Comcast Corporation ("Comcast") to respond to the Media Bureau's request for submission of information pertaining to certain programming contracts. Unless this information is placed in the record of the Commission's proceeding, there will not be a full record. And if opponents are denied access to this information subject to the strict protective orders designed to protect the confidentiality of business information, there will not have been a full opportunity for them to file facts and arguments based on that data.

The Media Bureau has requested production of certain programming contracts, which would have resulted in the material being placed in the record. This information is material to the determination that Comcast's proposed acquisition of control of NBC Universal ("NBCU") is in the public interest. ***Accordingly, we ask that the Commission defer any action on the proposed transaction until the requested information is placed into the Commission's record, and the staff, including the Commissioners' personal staff, has had at least 10 days to review this information. This will also allow objecting parties to review the information pursuant to the protective orders the staff has adopted, and to comment thereupon.***

At issue is a key component of the Media Bureau's information request first propounded to

Comcast on May 21, 2010.¹ Request Number 44 required Comcast to provide, among other things, all program carriage contracts executed since 2006.² Comcast has thus far failed to supply *any* information to the Commission in response to Request Number 44.³

Because of Comcast's prolonged failure to comply with Request Number 44, in a December 15 meeting attended by Mr. Flynn and by representatives of Media Access Project, Free Press, Consumers Union and Public Knowledge, he was asked whether the Commission staff had reviewed documents responsive to Request Number 44 which had been provided, not to the Commission, but to the Department of Justice. Mr. Flynn responded to the inquiry in a telephone conversation on December 21, 2010.⁴ He did not answer directly, but stated that the Commission staff has access to documents which have been submitted to the Department of Justice and that it is aware of its obligation to insure that the Commission's record reflects documents upon which the Commission has relied in its review of the pending applications.

Information relating to Comcast's programming contracts is highly material to a number of issues which have been raised in this proceeding. Of particular importance to Public Interest Groups is the fact that it appears that Comcast has imposed contractual restraints on program suppliers which have the effect of precluding the sale of this content to competing online-only distributors. Evidence supporting this contention was submitted to the Commission in a confidential portion of the *Reply to Opposition* filed by Free Press, Media Access Project, Consumer Federation of America, and Consumers Union on August 19, 2010, at page 18.⁵ As they explained, "[w]ithout access to such contracts it is impossible to determine the exact extent to which Comcast limits programmers' ability to distribute their content via the internet." They also pointed to other confidential information submitted by Comcast which strongly suggest that Comcast has, indeed, imposed such contractual restraints. *Id.*

The programming contracts are also essential to resolution of issues raised by independent

¹See Information and Discovery Request for Comcast Corporation, MB 10-56 (released May 21, 2010).

²"Provide all agreements currently in effect and all agreements executed since January 1, 2006 that the Company has entered into with any provider of Video Programming which discuss cable network carriage, retransmission consent, program carriage, and distribution rights for Video Programming."

³Comcast stated that, "[p]ursuant to discussions with Commission staff, the response to this request has been deferred pending further review and consultation." Supplemental Response to Request for Information filed by Comcast Corporation (June 30, 2010). Comcast has similarly failed to provide information responsive to Request Numbers 32 and 51, which may also cover highly material information.

⁴See Letter from Andrew Jay Schwartzman, Media Access Project, to Marlene Dortch, December 22, 2010.

⁵See Letter from Corie Wright, Free Press, to Marlene Dortch, November 18, 2010.

programmers such as Bloomberg, LP. Bloomberg has identified the use of channel placement as a tactic which can be used for anti-competitive purposes, and its claims cannot be fully assessed without resort to contracts showing how other programmers are treated. Moreover, Comcast has relied on claims that it is contractually precluded from fulfilling the “neighborhooding” remedy that Bloomberg has sought.⁶

It is not enough that some members of the Commission staff might have had access to these contracts at the Department of Justice. First, any such review makes the material part of the record on which the Commission will act, and requires that they be placed in the Commission’s record. More importantly, any such examination would be without the benefit of arguments as to their significance from the interested parties.

The Commission cannot make a reasoned decision without giving all relevant members of the Commission and staff access to this information, and without receiving arguments from affected companies and the public as to the contents and significance of such contracts.

Respectfully submitted,



Andrew Jay Schwartzman

cc. John Flynn
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⁶See Letter from Stephen Diaz Gavin, Counsel to Bloomberg, LP, to Marlene Dortch, November 16, 2010.